IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-1185062
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Onni E. SELENIUS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1781

Onnis e. SELENIUS

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 8 May 1967, an Examiner or the United States Coast Guard at Seattle, Washington, suspended Appellant's seaman's documents for two months plus six months on ten months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as second electrician on board SS NORTHWESTERN VICTORY under authority of the document above captioned, Appellant:

1) on or about 13, 14, and 31 March 1967, and 1, 10, 11, and 12 April 1967, wrongfully failed to perform duties;

2) on 11 April 1967, wrongfully damaged ship's property, a mattress in the ship's hospital; and

3) on 26 March 1967, created a disturbance aboard the vessel.

At the hearing, Appellant elected to act as his own counsel. Appellant entered a plea of nolo contendere to the charge and not guilty to each specification.

The Investigating Officer introduced in evidence voyage records of NORTHWESTERN VICTORY and the testimony of two witnesses.

In defense, Appellant made an unsworn statement.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of two months plus six months on ten months' probation.

The entire decision was served on 29 May 1967. Appeal had

been timely filed on 28 May 1967. Althought granted further time to add to his original notice of appeal, Appellant has not done so, nor has he complied with the Examiner's order.

FINDINGS OF FACT

On all dates in question, Appellant was serving as second electrician on board SS NORTHWESTERN VICTORY and acting under authority of his document.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. the confused grounds for appeal will not be recited because of the disposition to be made of this case. Only one of Appellant's points need be discussed.

APPEARANCE: Appellant, pro se.

OPINION

I

Appellant asserts, "No legal notice was given of a hearing against the person of the appellant." There is no need to quible that these proceedings are not against the "person" of the Appellant. He alleged before the Examiner, at hearing, that he had not properly been served with notice, because the original sheet had not been signed by the Investigating Officer. The Examiner pointed out, without looking at the original notice, that Appellant had appeared and that his protest of lack of service was untimely, since by his appearance and his failure to complain until all the evidence was in, he had waived the possibility of claiming lack of notice.

What the Examiner did not mention, but which I see in the record is that the official record copy of the notice of hearing is not only signed by the Investigating Officer but contains an acknowledgment of service signed by Appellant himself.

This single point of Appellant is discussed so that the record of proceedings can be validated to the point at which the Investigating Officer rested his case. Appellant's argument on this point is without merit.

He had notice, he acknowledged notice, he appeared pursuant to notice. The hearing was validly opened and due process was accorded up to the time discussed immediately below.

II

While Appellant pleaded nolo contendere to the "charge" of misconduct, he pleade "not guilty" to each specification. This pleading was inconsistent because one denying all specific allegations is not unwilling to contest the general charge required by the statute. (R.S. 4450) The plea to the charge should have been changed.

Under many circumstances this error would not be prejudicial, if the plea of nolo had been construed as or treated as a plea of not guilty. In this case, it was not.

When the Investigating Officer rested his case (R-25) the Examiner said to Appellant, "Now Mr. Selenius, are you still standing on your plea of nolo contendere?" Appellant answered, "To the charge yes." The Examiner then moved the proceedings to the stage of argument.

Appellant, in view of his pleas of not guilty to each specification, was denied the opportunity to testify in his own behalf.

III

In view of the disposition to be made of this case, a misapprehension of the Examiner may be corrected. At R-8, the Examiner said, with respect to a certain official logbook entry, "the law is quite clear that logbook entries are in the nature of a document which was made in the regular course of business and they are admissible in evidence in any federal proceedings. However, if they are not made in compliance with 46 U.S.C. 702, then, although they may be admissible in evidence, they cannot be given any weight."

There is a great difference between the holding that a log entry not made in accordance with 46 U.S.C. 702 is admissible in evidence but does not, by itself, constitute a prima facie case, and a theory that such a log entry, while admissible in evidence, must be accorded no weight.

The latter theory would render the admissibility of the document meaningless. The trier of facts is free to evaluate the weight he will give to admissible evidence. It is the rule in proceedings under R.S. 4450 that an official log entry made in substantial accordance whith the statutes constitutes a prima facie case as to the facts alleged therein, but that a log entry found deficient under the statutes is admissible as an exception to the "hearsay" rule as a record made in the regular course of business, it follows:

1) that such defective entry when considered along with other substantial evidence can be the basis of allowable findings;

2) that such an entry must not necessarily be denied any weight at all.

The principle here involved is that examiners, while free to evaluate the weight of log entries not made in accordance with law, are not required to deny them any weight whatsoever. The weight to be accorded depends upon conscious evaluation by the examiner.

If an examiner is to give no weight to an admissible document, his judgment must be explicable in the same manner as his rejection of the probative value of any other evidence. There is no rigid rule in these proceedings that any admissible evidence must be accorded no weight. Such a rule would be self-frustrating.

The rule in these proceedings is to require that greater weight be given to a log entry made in accordance with 46 U.S.C. 202 and 702 than would be necessary under the usual "business entry" rule. The log entry made in substantial compliance with the law passes the burden of proceeding to the person charged. If he does not undertake the burden of proceeding, an examiner would be wrong in not finding the specified act proved.

If the entry does not meet the statutory requirements, it does not pass the burden of proceeding, but this does not mean that an examiner who finds the entry admissible in evidence as an exception to the "hearsay rule" may not utilize it "in conjuction with other substantial evidence of a reliable and probative character" as a basis for making findings.

CONCLUSION

It is conclude that Appellant, by acceptance of his plea of nolocontendere as to the charge, in connection with his pleas of not guilty to all specific allegations, was denied proper hearing in that he was foreclosed from testifying under oath on the merits of the specific allegations. The case must be remanded with the instruction to change the plea of "nolo contendere" to the charge to a plea of "not guilty," and to allow Appellant the opportunity to testify under oath on the specific allegations if he so desires, or present any other allowable defense.

The substantive proceedings, up to the point at which the Investigating Officer rested his case are still valid and are not disturbed by this decision.

The record in this case shows that Appellant gave an address of next of kin, on the articles of NORTHWESTERN VICTORY, as 428 N. Pleasant, Amherst, Mass. The next of kin, named Helen Walsh, is not further identified.

The record further shows that when the Examiner discussed service of the decision by mail on Appellant the following coloquy ensued:

> "The EXAMINER: Now are you intending to go back to Miami as soon as possible....?
>
> "PERSON CHARGED: Mail sent to Miami will always reach me sooner or later...." (R-33)

No Miami address is given in the record and Appellant's notice of appeal gives no address for return mail.

A copy of this decision will be sent to the Amherst, Mass., address. Since the Examiner dealt with Appellant at some Miami address not specified on the record, further notice may be in order.

ORDER

The findings and order of the Examiner dated at Seattle, Washington, on 8 May 1967, are VACATED. The case is REMANDED to the Examiner for further proceedings consistent with this decision.

W.J. SMITH
Admiral U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 7th day of November 1969.

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